

RATIONALE

State of Tennessee General NPDES Permit for the Application of Contact Aquatic Herbicides to Reelfoot Lake

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1. Background

Activities considered in this rationale sheet are the mixing and application of contact aquatic herbicides to Reelfoot Lake, a water of the State of Tennessee.

Tennessee's Water Quality Control Act and the federal Clean Water Act (CWA) require that the application of these herbicides to the waters of the State of Tennessee be permitted by the Department of Environment and Conservation (TDEC) under the National Pollutant Discharge Elimination System (NPDES) permit program.

Because permit requirements for this activity are similar, it is the opinion of the Division of Water Resources (DWR) that this category of sources would be controlled more appropriately under a general permit than under individual permits.

This Rationale Sheet describes and gives the basis for permit conditions to be applied to the application of herbicides to Reelfoot Lake.

2. Description of activities

This permit is for the application of herbicides to Reelfoot Lake. This permit does not apply to the portion of Reelfoot Lake that is contained within the Reelfoot Lake National Wildlife Refuge. The purpose of herbicide application is to control aquatic macrophytes. The activity must be authorized by Tennessee Wildlife Resources Agency (TWRA).

3. Permitting methodology

The division consulted with TWRA to develop a permitting strategy. In addition, this permit is issued as an NPDES permit as opposed to a State Operating Permit (SOP) in consideration of the January 7, 2009, Sixth Circuit Court of Appeals decision (National Cotton Council of America v. EPA) that vacated the Environmental Protection Agency (EPA) November 2007 final rule which exempted pesticides applied in

accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) from the CWA's permitting requirements. The Sixth Circuit Court held that pesticide residuals and biological pesticides constitute pollutants under the CWA and therefore EPA's final rule must be vacated.

4. Proposed terms and conditions

The following terms and conditions are incorporated in the proposed permit.

- (a) Herbicides shall be limited to those on both TWRA's list and the Environmental Protection Agency's list of registered herbicides approved for use in water. Further, the applicator must follow all label requirements.
- (b) Application of herbicides shall only be by persons authorized by TWRA and who meet all requirements of TWRA's Reelfoot Wildlife Management Area Vegetation Manipulation permit.
- (c) Application of herbicides is limited to a total treatment area of four acres or less around duck blinds or other fixed structures. Square footage determination will include the treated area along boat channels and/or along navigable boat lanes to provide blind access, in addition to the treated area around the structure(s).
- (d) Adverse impact to formally listed state or federal threatened or endangered species or their critical habitat, or to cultural, historical, or archeological features or sites is prohibited.
- (e) Section I.C.1 states that in addition to TDA requiring that individuals applying aquatic herbicides must be licensed or working under the supervision of someone with a license, that this permit also requires the same licensure. The third paragraph of section I.C.1 now states, "TDA regulations and this permit require that an individual applying contact aquatic herbicides must be licensed or working under the supervision of someone with a license."
- (f) The permit requires the use of herbicides approved by the Tennessee Department of Agriculture (TDA) for the control of both emergent and non-emergent aquatic plants. The second paragraph of section I.C.1. states, "This permit allows only the use of herbicides approved by the Tennessee Department of Agriculture (TDA) for the control of both emergent and non-emergent aquatic plants." A listing of herbicides registered by the TDA is available under "Online Pesticide Systems" on their website at www.state.tn.us/agriculture/regulatory/aip.html.

5. Notification requirements and authorization to discharge

- (a) Permit coverage

The permit will authorize the application of contact aquatic herbicides in Reelfoot Lake. This permit does not apply to the portion of Reelfoot Lake that is contained within the Reelfoot Lake National Wildlife Refuge. Historically, TWRA has regulated the application of aquatic herbicides in Reelfoot. This practice will continue. The division believes that a general NPDES permit is appropriate due to the existing regulation via TWRA and the relatively small scale of each application site.

- (b) Notice of Intent (NOI) requirements

This permit does not require the submittal of an NOI. Federal rules at 40 CFR § 122.28(b)(2)(v) allows authorization to discharge under a general permit without submitting a notice of intent where a notice of intent requirement is determined to be inappropriate. In this case, an NOI is not

needed since the owner/operator must submit an application and receive permit coverage from TWRA before being authorized under this permit.

(b) Reporting Requirements

This permit requires an annual report from TWRA that summarizes all herbicide application activities in Reelfoot Lake. This comprehensive report will provide the division with information necessary to evaluate the environmental impacts of contact aquatic herbicide application in Reelfoot Lake.

6. Permit issuance procedures

(a) Administration

This general permit is drafted in accordance with the Tennessee Water Quality Control Act (§ 69-3-101 et seq.), and the department's permit issuance regulations (Rules of the Department 0400-40-10-.01, -.02, -.03.)

(b) Consideration of comments and permit issuance decisions

The Division of Water Resources proposes to issue this permit with the described requirements and standard conditions. These conditions are tentative and open to comment. Interested persons are invited to submit comments for consideration, by letter or by email.

Comments should be submitted to:

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